IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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| WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation, | ) | CIVIL DIVISION |
| Plaintiff, | ) | |
| vs. | ) | C.A. No. 00-2041 |
| PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES von BERNUTH, an individual and JOHN HERKLOTZ, an individual, | ) | Judge William L. Standish |
| Defendants | ) | |

**BRIEF IN OPPOSITION TO MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. 1404(a)**

FACTUAL BACKGROUND

On July 21, 2006, this Honorable Court granted Plaintiff's Motion for Summary Judgment as to Defendant Herklotz's liability to WRS. As a result, the only issue remaining is the amount of that liability. As argued in Herklotz's Motion for Partial Summary Judgment, Herklotz contended that the business records of WRS were not sufficiently reliable to constitute proof of damages. Because of that concern, WRS and Herklotz stipulated to retain Schneider Downes, Inc. as a forensic accountant to evaluate the reliability of the WRS business records. As shown in WRS's Motion for Summary Judgment as to damages filed in conjunction with its Response to Defendant's Motion to Transfer Venue, Schneider Downes, Inc. concluded preliminarily that the business records of WRS were reasonably reliable and accurately reflected the amount owed by Plaza Entertainment, Inc.

Following the delivery of the Schneider Downes, Inc.'s draft report on April 29, 2006, Herklotz filed his Motion to Transfer Venue to California asserting a decline in his health limiting his ability to travel and his intention to call Erik Parkinson, Charles von Bernuth, Neil Carrey, Esquire and Thomas Gehring, Esquire, all of whom are alleged to reside in California, as witnesses at trial and suggest the fact that they are beyond the subpoena power of the Court and makes California a more convenient form for Herklotz.

WRS has responded to the Motion with a Motion to Dismiss and a Response requesting that the Motion be denied. This Brief is in support of this position.

ARGUMENT

28 U.S.C. §1404 enables the district court to transfer a case to another district court in the interest of fairness and convenience. Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988). The moving party has the burden of establishing the factors supporting the request for transfer. In re: Armendt, 169 Fed. Appx. 93, 2006 U.S. LEXIS 3944 (3rd Cir. 2006). The Plaintiff's choice of venue should not be lightly disturbed. Jumara v. State Farm Ins. Co., 55 F. 3d 873, 1995 U.S. Apps. LEXIS 13598 (3rd Cir. 1995). Transfer is improper if it merely shifts the inconvenience to the other party. Labrot v. John Elway Chrysler Jeep, 436 F. Supp. 729(E.D. Pa. 2006).

Where the movant requests transfer because the proposed venue would be more convenient for the movant's witnesses, the movant must establish by some evidence that the testimony of the proposed witnesses is material to issues pending before the Court; that those witnesses are unwilling to attend the trial in the current forum; that their deposition testimony would not be satisfactory; and that a compulsory process would be necessary. Scheidt v. Klein, 956 F. 2d 963 (10th Cir. 1992). To satisfy this burden, the movant must submit Affidavits of the proposed witnesses attesting to the substance of their testimony and their unwillingness to attend trial. Plum Tree, Inc. v. Stockment, 488 Fed. 2d 754 (3rd Cir. 1973). Labrot v. John Elway Chrysler Jeep, supra; Figgie International, Inc. v. Destileria Serralles, Inc. , 925 F. Supp. 411, 1996 U.S. Dist. LEXIS 6211 (DCSC 1996).

Herklotz's Motion does not indicate that he intends to testify at trial. Assuming that he does intend to testify, Herklotz's Motion does not contain any representation, nor is it supported by an Affidavit, attesting to the substance of the testimony that Herklotz intends to give. Accordingly, the Court cannot evaluate whether Herklotz's intended testimony has any relevance or materiality to the remaining issue of damages. Similarly, Herklotz's Motion has failed to attach Affidavits of Parkinson and von Bernuth elaborating on the substance of their proposed or intended testimony and attesting to their unwillingness to voluntarily appear on Herklotz's behalf should a trial occur.

Although Herklotz refers to F.R.C.P. 45(a)(c)(ii), which enables a non-party person to move to quash a subpoena requiring them to appear more than 100 miles from their home, neither Parkinson nor von Bernuth are persons to whom the rule applies. Both Parkinson and von Bernuth are parties to the within action. Furthermore, Parkinson and von Bernuth are officers of Plaza Entertainment, Inc., which is a party to the action. Accordingly, their attendance at the proceeding could be compelled.

With respect to the proposed witnesses identified as Neil Carrey, Esquire and Thomas Gehring, Esquire, Herklotz has also failed to provide any evidence of their proposed testimony to permit the Court to evaluate how their intended testimony bears upon the remaining issue of damages. Accordingly, Herklotz's Motion fails to identify how their testimony is relevant and material to the remaining issue of damages. Similarly, neither Mr. Gehring nor Mr. Carrey has executed an Affidavit testifying to their unwillingness to attend a trial in this forum.

More importantly, it is obvious that deposition testimony of Parkinson, von Bernuth, Carrey and Gehring cannot be presented by Herklotz in the event of a trial because Herklotz never deposed these witnesses. It should not come as a surprise to Herklotz after six plus years of litigation that their testimony (whatever it might be) might be important to his defense and that compelling their attendance at trial might be difficult. However, it is not as if Herklotz did not have the opportunity to depose these individuals in California for use at a possible trial in Pittsburgh. It is not Plaintiff's fault that Herklotz chose to ignore their importance until this last minute. Therefore, Herklotz cannot now establish that the deposition testimony of these individuals would not have been a satisfactory substitute for their personal appearance at a trial.

## CONCLUSION

In summary, Herklotz's Motion has failed to set forth a sufficient basis upon which the Court can entertain his Motion to Transfer Venue under 11 U.S.C. §1404(a) and WRS respectfully suggests that it should be dismissed.

Finally, and most importantly, in conjunction with this Response to Motion to Transfer, WRS has filed a Motion for Summary Judgment as to damages asserting that based upon its business records and the opinion of Schneider Downes, Inc. and in absence of any affirmative defense of payment or other pleading requesting adjustment by Plaza Entertainment, Inc., there is no genuine issue of material fact as to the amount of damages. This is further enhanced by the fact that Herklotz has failed to indicate how his testimony or any of the proposed witnesses identified in his Motion for Transfer would provide evidence that in any way effected the issue of damages. Herklotz's concerns about his declining ability to travel may be alleviated by the dismissal of this Motion and the granting of the Motion for Summary Judgment as to damages. Therefore, WRS, Inc. d/b/a Motion Picture Video Laboratories respectfully requests that the Court dismiss the Motion to Transfer Venue for failing to set forth a sufficient basis for the Court to consider it or, in the alternative, that the Court deny it and, secondly, that the Court address the matter by granting its Motion for Summary Judgment as to damages.

Respectfully submitted,

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Plaintiff,

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Defendants.

CIVIL ACTION

No. 00-2041

**CERTIFICATE OF SERVICE**

I, Thomas E. Reilly, Esquire, hereby certify that a true and correct copy of the Plaintiff's Brief in Opposition was delivered via first-class mail, postage pre-paid on the __13th__ day of October, 2006 to the following:

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